IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 14, 2005 Session

TAMMIE C. ALLEN v. SIDNEY MCPHEE, ET AL.

Appeal from the Circuit Court for Rutherford County
No. 49684 Tom Gray, Judge

No. M2005-00202-COA-R3-CV - Filed May 12, 2006

State employee sued the State of Tennessee, Middle Tennessee State University, its Chancellor, and the Tennessee Board of Regents for gender-based discrimination in the form of a sexually hostile work environment and for retaliation in violation of the Tennessee Human Rights Act. Employee also sued the President of MTSU individually for sexual harassment and for retaliation in violation of the Tennessee Human Rights Act. The trial court granted the President of MTSU and the State's motions for summary judgment on all issues. We affirm the decision of the trial court in all respects.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

WILLIAM B. CAIN, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., J., joined. PATRICIA J. COTTRELL, J., did not participate.

Steven E.Sager, L. Gilbert Anglin, Murfreesboro, Tennessee, for the appellant, Tammie C. Allen.

Barbara J. Moss, Nashville, Tennessee, for the appellee, Sidney McPhee, in his individual capacity.

Paul G. Summers, Attorney General and Reporter; William J. Marett, Jr., Sr. Counsel, Civil Litigation and State Services Division; for the appellees, State of Tennessee, Tennessee Board of Regents, Middle Tennessee State University, Charles Manning in his official capacity as Chancellor of the Tennessee Board of Regents, and Sidney McPhee in his official capacity as President of Middle Tennessee State University.

OPINION

In September 1992, the State of Tennessee ("the State") hired Tammie C. Allen ("Allen") as a Secretary at Middle Tennessee State University ("MTSU"). Allen assumed the position of Executive Secretary in the President's Office in August 1999, and was later promoted to Administrative Assistant. At that time, Dr. James Walker was the President of MTSU. Upon Dr. Walker's resignation, Dr. R. Eugene Smith was appointed as Interim President. Sidney McPhee ("Dr. McPhee") became President of MTSU in August 2001, and Allen thereafter began working for him.

On October 6, 2003, Allen filed a sexual harassment Complaint against Dr. McPhee with the Tennessee Board of Regents for the State of Tennessee and Community College System (TBR) and its Chancellor, Charles W. Manning ("Chancellor Manning"). Allen alleged that in August 2002, Dr. McPhee began engaging in inappropriate and unwanted sexual misconduct towards her. Allen asserted in her Complaint that the first incident of harassment occurred in August 2002, when Dr. McPhee invited her to play golf at Cedar Crest Golf Club in Rutherford County. Allen alleged that during the round of golf, Dr. McPhee attempted to kiss and touch her and that all of his actions were offensive and unwanted. According to the Complaint, Dr. McPhee engaged in similar conduct during golf outings on two other occasions, on August 26, 2002, and on October 2, 2002.

Allen asserted that sexual harassment also occurred on Saturday, February 15, 2003, when Dr. McPhee called Allen at her home and requested that she report to work. Allen claimed that while assisting with routine administrative matters in Dr. McPhee's office, Dr. McPhee shut the door and asked her to dance. Allen alleged that she unwillingly complied with Dr. McPhee's multiple requests to dance throughout the day and that during the last dance, Dr. McPhee touched her in an offensive manner. According to Allen, Dr. McPhee called her at home again the next day and requested that she report to work. Allen claimed that she attempted to call Dr. Duane Stucky ("Stucky"), a former MTSU employee, in order to seek advice about how she should handle the situation, but she was unable to reach him. Allen reported to work and claimed that shortly after she arrived, Dr. McPhee began playing music again and asked her to dance. Allen claimed that she complied with Dr. McPhee's multiple requests but that she conveyed to him that it made her feel uncomfortable.

Allen asserted that after leaving the office, she spoke with Stucky and revealed the general circumstances surrounding the alleged harassment. Allen claimed that she also spoke with Dr. Watson Hannah, Director, Office of the Executive Vice President and Provost for MTSU, Dr. Richard Hannah, a faculty member of MTSU, and Dr. Bob Eaker, a faculty member of MTSU and Interim Executive Vice President and Provost, about the alleged incidents of sexual misconduct. She considered these individual friends whom she believed could offer support and advice. Allen claimed that none of the individuals advised her to report Dr. McPhee's conduct to the EO/AA Director.

Allen alleged that the harassment worsened in August 2003. Allen claimed that during that time Dr. McPhee asked her to play golf on several occasions and that during these occasions Dr. McPhee asked her personal and sexually explicit questions and urged her to ask the same of him. Allen admitted that although she usually attempted to avoid the questions, at times she engaged in the conversations out of fear of jeopardizing her employment.

Allen asserted that Dr. McPhee's conduct continued on September 7, 2003, when he invited her to play golf after the Georgia football game. Allen claimed that while they were riding in the golf cart, Dr. McPhee offensively touched her and expressed a desire to engage in sexual acts with her. Allen claimed that similar offensive touching and comments were made by Dr. McPhee while riding on the President's bus, returning from both the South Carolina and Missouri football games.

Allen claimed that Dr. McPhee thereafter began acting distant towards her. She claimed that he did not invite her participate in the annual Neill-Sandler golf tournament in October 2003, although he had included her the previous year. Allen alleged that on September 29, 2003, Dr. McPhee called her into his office and told her that he was going to leave her alone and not "fool around" with her anymore. She claimed that he stated that he was not mad at her but that he did not want to be wasting her time and that he had sensed that she had been "pulling away" from him. She also asserted that Dr. McPhee said that he would no longer include Allen in any golf tournaments nor extend invitations to travel on the President's bus to the MTSU football games. Allen claimed that she told Dr. McPhee that she enjoyed playing golf but that the conduct on the golf course made her feel uncomfortable.

Allen claimed that the next day, Dr. McPhee approached her desk and told her that he felt bad about their conversation the day before, that he had difficulty expressing himself, and that some people had trouble knowing when they had crossed the line. Dr. McPhee allegedly stated that he did not want to push himself on Allen and that he understood that she might have trouble telling him "no." Allen claimed that she then reiterated that she enjoyed playing golf but that the prior misconduct made her feel uncomfortable.

Based upon Allen's allegations, the TBR and MTSU directed that an investigation be conducted under the supervision of Christine Modisher (Modisher), General Counsel for the TBR. Modisher assigned the investigation to Debbie G. Johnson (Johnson), the Assistant Vice Chancellor for Human Resources at the TBR, who conducted the investigation from October 8, 2003 through October 29, 2003.

Dr. McPhee was informed of Allen's Complaint on October 9, 2003, and instructed by TBR officials not to return to his office. Dr. McPhee categorically denied all allegations of sexual harassment. Beginning on October 10, 2003, Allen was placed on administrative leave with pay through October 17, 2003, with the agreement of Allen and her attorney, in order to remove Allen from any further contact with Dr. McPhee. Allen withdrew her original Complaint upon the request of Dr. McPhee because of a medical emergency and the possibility of private resolution. However, Allen refiled her original Complaint as well as additional Complaints for retaliation and constructive discharge on October 20, 2003. Dr. McPhee filed a written response to the original Complaint on October 20, 2003 and an amended response on October 29, 2003.

On October 16, 2003, Dr. McPhee issued a press release to the media where he acknowledged that a harassment complaint had been filed against him and stated that he would not address the specific allegations contained therein in order to protect the mediation process. He also asked that the media exercise restraint. Dr. McPhee sent an email to MTSU staff and students stating that he had issued a press release and asking that the recipients focus on their work, on the University, and not to become distracted.

On October 17, 2003, counsel for TBR spoke with Allen's attorney, who was told that Allen should report to work on Monday, October 20, 2003, in the Development Office at MTSU with the same job title, job classification, and rate of pay. The alleged purpose of the transfer was to ensure

that Allen was working in an environment free from harassment and any retaliation pending the outcome of the investigation. Allen refused temporary reassignment and notified TBR that she intended to report to the President's Office on Monday morning. That was not acceptable to TBR, and thus Allen was allowed to remain on administrative leave with pay.

According to the report filed by Johnson on November 23, 2003, there were no witnesses to the alleged incidents of harassment. Johnson found no independent corroborating evidence to support or disprove Allen's allegations and found no other sexual harassment complaints regarding Dr. McPhee documented by his previous TBR employers, the University of Memphis, the Board of Regents Central Office or MTSU. Furthermore, Johnson identified no supervisory conduct by Dr. McPhee which resulted in a tangible job detriment such as discharge, demotion, denial of a promotion, or an undesirable reassignment with significantly different responsibilities. She found that there was no change in Allen's title, job classification, salary, or benefits as a result of any action by Dr. McPhee.

However, Johnson concluded that Dr. McPhee's initiating non-work related encounters, such as frequent twosome golf games on week days, hugging on the golf course, explicit personal sexual conversations and innuendo, and slow dancing together in the President's Office on the weekend was conduct that was objectively sufficient to create a hostile work environment and violated TBR guideline P-080.

On December 5, 2003, Chancellor Manning accepted and implemented Johnson's report and recommendations in full. Chancellor Manning thereafter placed Dr. McPhee on leave without pay for 20 days, decreased his salary by $10,000 for one year, and required Dr. McPhee to participate in eight (8) hours of employment issue training, including sexual harassment law. Chancellor Manning determined that Dr. McPhee was to remain the President of MTSU and that Allen should be transferred to the position of Coordinator in the University's Development Office, where she would report directly to the Vice President for Development at MTSU.

In response to a request in accordance with the Tennessee Open Records Act, the TBR released the identity of Dr. McPhee and the nature of the Complaint to the news media on October 14, 2003. The TBR notified Allen in advance that it planned to release the full Complaint to the news media on October 16, 2003. Allen sought and obtained a temporary restraining order from the Chancery Court for Rutherford County, Tennessee, on October 16, 2003, prohibiting the release of the Complaint. The temporary restraining order was dissolved by the court on December 11, 2003.

On December 18, 2003, Dr. McPhee issued a second press release acknowledging that a TBR investigation was conducted into allegations made against him and that he accepted the Board's recommendations and penalties. In January 2004, Dr. McPhee was interviewed by *Sidelines*, the MTSU student newspaper, in which he stated that a thorough investigation was conducted of the allegations against him, a decision was made by Manning and the TBR, and that he accepted the decision.

On February 13, 2004, Allen filed a Complaint in the Circuit Court for Rutherford County, Tennessee alleging unlawful gender-based discrimination in the form of a sexually hostile work environment and retaliation in violation of the Tennessee Human Rights Act (THRA). Allen sued Dr. McPhee individually for his alleged sexually harassing conduct and for retaliation in his official capacity as President of MTSU. Allen also sued MTSU, the TBR, the State of Tennessee and Chancellor Manning in his official capacity as Chancellor for the TBR. The State filed a motion for summary judgment on April 15, 2004, and Dr. McPhee filed his own motion for summary judgment on November 29, 2004. The State also filed a motion to strike the affidavit of Allen on June 25, 2004. A hearing was held on December 20, 2004, before Chancellor Tom Gray. The trial court entered a final order on December 17, 2004, incorporating the court's oral ruling and granting the State and Dr. McPhee's motions for summary judgment but denying the State's motion to strike the affidavit of Allen. Allen filed a timely notice of appeal.

Allen raises six issues on appeal. Allen contends it was error for the trial court to find as a matter of law that (1) Dr. McPhee was not individually liable for aiding and abetting under the THRA; (2) Dr. McPhee was not individually liable for retaliation pursuant to the THRA; (3) the State was not liable for the alleged actions of Dr. McPhee under a direct alter-ego theory and thus were not precluded from raising the *Faragher/Ellerth* affirmative defense; (4) the State exercised reasonable preventative and corrective measures; (5) Allen unreasonably failed to take advantage of the preventative and corrective measures provided by the State; and, (6) the State was not liable for retaliation pursuant to the THRA.

The standard of review of a trial court's decision to grant summary judgment is well settled. Since the Court's inquiry involves purely a question of law, no presumption of correctness attaches to the trial court's judgment and the Court is confined to reviewing the record to determine whether the requirements of Tennessee Rule of Civil Procedure 56 have been met. *Cowden v. Sovran Bank /Central South*, 816 S.W.2d 741, 744 (Tenn.1991).

Summary judgment is only appropriate where there is no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law on the undisputed facts. *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn.1993). The court must view the evidence in the light most favorable to the nonmoving party and must draw all reasonable inferences in the nonmoving party's favor. *Byrd*, 847 S.W.2d at 210-211. The court should grant summary judgment only when both the facts and the conclusions to be drawn from the facts permit a reasonable person to reach only one conclusion. *Byrd*, 847 S.W.2d at 210-211.

I. Aiding and Abetting Claim Against McPhee

The first issue Allen raises on appeal is whether Dr. McPhee proved as a matter of law that he cannot be held individually liable for aiding and abetting. The THRA, Tennessee Code Annotated section 4-21-301(2) provides:

> It is a discriminatory practice for a person or for two (2) or more persons to:
> ...

> (2) Aid, abet, incite, compel, or command a person to engage in any of the acts or practices declared discriminatory by this chapter.

Tenn.Code Ann. § 4-21-301(2).

Although generally, there is no individual liability under the THRA, *Carr v. United Parcel Service*, 955 S.W.2d 832, 834 (Tenn.1997), the Tennessee Supreme Court has found that individual liability exists under Tennessee Code Annotated section 4-21-301(2) based upon the fact that "the THRA is broader than Title VII in terms of who may be liable for harassment and discrimination." *Carr*, 955 S.W.2d at 835. The Court in *Carr* noted that the statute does not define "aiding and abetting," therefore, the Court adopted elements of the common law civil liability theory of aiding and abetting. *Carr*, 955 S.W.2d at 836. The common law requires that, "the defendant knew that his companions' conduct constituted a breach of duty, and that he gave substantial assistance or encouragement to them in their acts." *Carr*, 955 S.W.2d at 836. In addition, liability requires affirmative conduct by the individual defendant. *Carr*, 955 S.W.2d at 836.

Allen contends that Dr. McPhee aided and abetted the State by engaging in a campaign to contrive, mislead, and obstruct the investigation by fabricating stories which cast Allen in a false light in an effort to undermine her credibility. Allen relies on two Tennessee cases where the harassing supervisor denied involvement in the misconduct and the court held the supervisor individually liable. In *Harris v. Dalton*, No. E2000-02115-COA-R3-CV, 2001 WL 422964, at *4 (Tenn.Ct.App. Apr. 26, 2001), Defendant denied a subordinate's allegations of sexual harassment and thereafter urged his employer to terminate Plaintiff. The court held that Defendant was individually liable because his denial "effectively ended the inquiry into the allegations and hence, nothing was done to actually correct the situation." *Harris*, 2001 WL 422964, at *4. In *Steele v. Superior Home Health Care of Chattanooga*, No. 03A01-9709-CH-00395, 1998 WL 783348, *8 (Tenn.Ct.App. Nov. 10, 1998), Defendant denied allegations of harassment and as a result, no further investigation was conducted. The court held that Defendant was liable for aiding and abetting because the supervisor "escaped discipline" and then "proceeded to harass [the plaintiff] with increasing frequency and severity, until he ultimately resigned." *Steele*, 1998 WL 783338, at *9.

In both *Harris* and *Steele*, it is clear that the supervisor-defendants acted affirmatively to aid, incite, compel or command their employers not to take remedial action to cure the hostile work environment, either by advising the employer to terminate the plaintiff or by deterring the investigation and escaping discipline. However, in the instant case, although Dr. McPhee denied some of Allen's allegations, there is no evidence in the record that he attempted to persuade Manning to terminate Allen nor is there evidence that he deterred the investigation and avoided punishment. To the contrary, it is undisputed that the TBR investigated the matter from October 8, 2003 through October 29, 2003, and at the conclusion of the investigation, Chancellor Manning implemented the investigator's proposed sanctions in full. Dr. McPhee's denial of misconduct alone is insufficient to impose individual liability under Tennessee Code Annotated section 4-21-301(2).

Allen also contends that Dr. McPhee's personal participation in the behavior which created the hostile work environment is sufficient to impose individual liability under Tennessee Code

Annotated section 4-21-301(2). Tennessee courts have yet to address this issue, however, other states with statutes similar to the THRA, have imposed individual liability upon supervisors for aiding and abetting when the supervisor actually participated in the behavior creating the illegal environment. (see *Tomka v. Seiler Corp*., 66 F.3d 1295, 1317 (2nd Cir.1995); *Hurley v. Atlantic City Police Dept.*, 174 F.3d 95, 126 (3rd Cir.1999); *Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873, 888 (D.C.1998)). However, the Tennessee Supreme Court stated in *Carr* that "[a] supervisor, ... may be individually liable for encouraging or preventing the employer from taking corrective action. Absent such allegations, [supervisor-defendants] [cannot] be held individually liable under a hostile work environment theory." *Carr*, 955 S.W.2d at 838. In addition, this Court noted in *Harris* the difference between the holding in *Carr* and other jurisdictions stating:

> In *Carr*, the Court defined "aiding and abetting" as knowing that the employer was breaching a duty, and giving "substantial assistance or encouragement to them in their acts." *Id.* at 836. The Court thus held that to make a finding of accomplice liability for a supervisor in a hostile work environment, there must be a showing that the supervisor encouraged or prevented the employer from taking corrective action. *Id.* Cf. this holding with other jurisdictions which have similar aiding and abetting provisions in their State human rights statutes. Most courts have held that interaction can constitute aiding and abetting if it provides "substantial assistance or encouragement", that liability for aiding and abetting does not depend upon an intent to discriminate, and that the actual harassment itself can constitute aiding and abetting. *See Gardenhire v. New Jersey Manufacturers Ins. Co.*, 754 A.2d 1244 (N.J.Super.Ct.Law Div.2000); *Bogdahn v. Hamilton Standard Space Sys. Int'l Inc.*, 741 A.2d 1003 (Conn.Super.Ct.1999); *Chapin v. University of Massachusetts*, 977 F.Supp. 72 (D.Mass.1997); *Colorado Civil Rights Comm. v. Travelers Ins. Co.*, 759 P.2d 1358 (Colo.1988).

Harris, 2001 WL 422964, at *3.

We therefore decline to extend individual liability to supervisors who participated in the behavior creating the hostile work environment absent a showing that the supervisor's conduct encouraged or prevented the employer from taking corrective action. Because Allen failed to show that Dr. McPhee's conduct encouraged or prevented the State of Tennessee from taking remedial measures, we affirm the trial court's decision to grant summary judgment on this issue.

II. Retaliation Claim Against Dr. McPhee

The next issue Allen raises on appeal is whether Dr. McPhee showed as a matter of law that he cannot be held individually liable for retaliation against Allen under the THRA. Tennessee Code Annotated section 4-21-301(1) provides:

> It is discriminatory practice for a person or for two (2) or more persons to:

> (1) Retaliate or discriminate in any matter against a person because such person has opposed a practice declared discriminatory by this chapter or because such person has made a charge, filed a complaint, testified, assisted or participated in any manner in any investigation, proceeding or hearing under this chapter.

Tenn.Code Ann. § 4-21-301(1).

In order to establish a *prima facie* case of retaliatory discharge under the THRA a plaintiff must prove the following: (1) the plaintiff engaged in a protected activity; (2) the exercise of the plaintiff's protected civil rights was known to the defendant; (3) the defendant thereafter took an employment action adverse to the plaintiff; and, (4) that there was a causal connection between the protected activity and the adverse employment action. *Newsom v. Textron Aerostructures, a div. of Avco, Inc.*, 924 S.W.2d 87, 96 (Tenn.Ct.App.1995).

Allen contends that Dr. McPhee is individually liable for retaliation because he mislead and obstructed the investigation by fabricating stories that cast Allen in a false light and undermined her credibility. She claims that Dr. McPhee accomplished this by issuing press releases which portrayed himself as the victim of false accusations, by making false assertions to the TBR investigator, and by issuing statements which contained false insinuations to MTSU employees and students.

However, in order to establish a *prima facie* case of retaliation, Allen must show that Dr. McPhee took an employment action which was adverse to her. *Newsom*, 924 S.W.2d at 96. "[A]n 'adverse employment action' is a materially adverse change in terms and conditions of employment, such as termination of employment, demotion with a decrease in salary, reclassification to a less distinguished title, material loss of benefits, or significantly diminished material responsibilities." *Spann v. Abraham*, 36 S.W.3d 452, 468 (Tenn.Ct.App.1999). Clearly, the issuing of two press releases, communicating with MTSU employees and students via email, and denying Allen's allegations is not a materially adverse change in the terms and conditions of Allen's employment.

III. Supervisor-Created Sexual Harassment Claim Against the State

The third issue on appeal is whether the State established that it could not be held liable for supervisor-created sexual harassment in violation of the THRA as a matter of law. Tennessee courts have held that under the THRA, "an employer is subject to vicarious liability to a victimized employee for actionable hostile work environment sexual harassment by a supervisor with immediate (or successively higher) authority over the employee." *Parker v. Warren County Util. Dist.*, 2 S.W.3d 170, 176 (Tenn.1999). However, the defending employer may raise an affirmative defense to liability or damages when no tangible employment action has been taken. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807, 118 S.Ct. 2275 (U.S.1998); *Burlington Indust., Inc. v. Ellerth*, 524 U.S. 742, 765, 118 S.Ct. 2257 (U.S.1998).

A. Is McPhee a Proxy for the State of Tennessee

Allen argues that the State is precluded from asserting the affirmative defense established by the Supreme Court in *Faragher* and *Ellerth* because Dr. McPhee is the alter ego or proxy of the State and as such, the State is strictly liable for his actions. In asserting this argument, Allen relies on language in *Faragher*, where the Supreme Court noted that the "standards for binding the employer were not in issue in *Harris*," the Court thereafter appeared to endorse strict liability when the harasser is a high-echelon employee, stating:

> In [*Harris*], ... [a] case of discrimination by hostile environment, the individual charged with creating the abusive atmosphere was the president of the corporate employer, 510 U.S., at 19, 114 S.Ct., at 369, who was indisputably within that class of an employer organization's officials who may be treated as the organization's proxy. *Burns v. McGregor Electronic Industries, Inc.*, 955 F.2d 559, 564 (C.A.2) (employer-company liable where harassment was perpetrated by its owner); see *Torres v. Pisano*, 116 F.3d 625, 634-635, and n. 11 (C.A.2) (noting that a supervisor may hold a sufficiently high position "in the management hierarchy of the company for his actions to be imputed automatically to the employer"), cert. denied, 522 U.S. 997, 118 S.Ct. 563, 139 L.Ed.2d 404 (1997); cf. *Katz*, *supra*, at 255 ("Except in situations where a proprietor, partner or corporate officer participates personally in the harassing behavior," an employee must "demonstrat[e] the propriety of holding the employer liable").

Faragher, 524 U.S. at 789-790.

There are no Tennessee cases directly addressing this issue, however, the Seventh Circuit in *Johnson v. West*, 218 F.3d 725, 730 (7th Cir.2000), recognized that "vicarious liability automatically applies when the harassing supervisor is either (1) 'indisputably within that class of an employer organization's officials who may be treated as the organization's proxy' or (2) 'when the supervisor's harassment culminates in a tangible employment action.'" (quoting *Faragher*, 524 U.S. at 808). The Fifth Circuit also appears to support holding employers strictly liable when the harasser is a high-echelon employee. In *Ackel v. Nat'l Commc'ns, Inc.*, 339 F.3d 376, 384-85 (5th Cir.2003), the appellate court reversed the district court, holding that the record created a question of fact as to whether the alleged harasser was the organization's proxy "such that his actions are imputable to defendant and the *Faragher/Ellerth* affirmative defense is unavailable." The court went on to say, "the issue of whether the alleged harasser was defendant's proxy is central to the resolution of this case because an employer is automatically liable for its proxies' harassment of employees." *Ackel*, 339 F.3d at 382.

Although we are not bound by the decisions of the federal courts other than the United States Supreme Court, the Tennessee Supreme Court has recognized that the legislature's stated purpose in codifying the THRA was to prohibit discrimination in a manner consistent with the Federal Civil Rights Acts of 1964, 1968, and 1972. Tenn.Code Ann. § 4-21-101(a)(1)-101(a)(2). Accordingly, the Court has held that "the stated purpose behind the enactment of our THRA will be best served by maintaining continuity between our state law and the federal law on the issue of imposing employer liability for supervisor sexual harassment." *Parker*, 2 S.W.3d at 176. We therefore find

that the *Faragher/Ellerth* affirmative defense is unavailable to employers when the harasser is a proxy for the employing organization.

We must now determine whether Dr. McPhee fulfills the requirements for proxy status for the State of Tennessee. Dr. McPhee is employed by the State of Tennessee at MTSU as its President, through which he is the executive head of the institution and of all its departments, and exercises such supervision and direction as will promote the efficient operation of the institution. However, Dr. McPhee, as President of MTSU, reports to the Chancellor and through him, to the TBR. Dr. McPhee is subject to the policies of the TBR and serves at the pleasure of the Board, as an employee of the State of Tennessee.

Allen contends that Dr. McPhee's position is analogous to that of a corporate employer's president, (see *Ackel*, 339 F.3d 376 (5th Cir.2003); *Harris v. Forklift Systems, Inc.* 510 U.S. 17 (U.S.1993)), or the principal owner of a business (see *Randall v. Tod-Nik Audiology, Inc.*, 704 N.Y.S.2d 228 (N.Y.App.Div.2000)), and thus he meets the qualifications of a proxy for the State. Allen also relies on *Johnson v. West*, 218 F.3d 725, 730 (7th Cir.2002), where the court stated that "*Faragher* suggests that the following officials may be treated as an employer's proxy: a president, owner, proprietor, corporate officer, or supervisor 'holding a sufficiently high position in the management hierarchy of the company for his actions to be imputed automatically to the employer.'" However, the court in that case concluded that Plaintiff's supervisor failed to meet the qualifications of a proxy stating,

> Although Williams had an important title, "Chief of Police," he had no less than two supervisors (Jones and his supervisor, Cummings) within the hospital and no doubt others within the VA's bureaucracy. As such, he was not a high-level manager whose actions "spoke" for the VA. See *Harrison v. Eddy Potash, Inc.*, 158 F.3d 1371, 1376 (10th Cir.1998). If automatic vicarious liability is warranted for Williams, there would be little or nothing left of the affirmative defense the Supreme Court took care to fashion in *Ellerth* and *Faragher.*

Johnson, 218 F.3d at 730.

It is well settled that Tennessee's state universities and university officials are appendages of the State. *See Dunn v. W.F. Jameson & Sons, Inc.*, 569 S.W.2d 799 (Tenn.1978); *Applewhite v. Memphis State Univ.*, 495 S.W.2d 190 (Tenn.1973); *Greenhill v. Carpenter*, 718 S.W.2d 268 (Tenn.Ct.App.1986); *Boyd v. Tennessee State Univ.*, 848 F.Supp. 111 (M.D.Tenn.1994). Because the TBR, MTSU, and Chancellor Manning are named in their official capacities in this matter, the State of Tennessee is the real defendant. We believe, that like the supervisor in *Johnson*, although Dr. McPhee has an important title, his actions do not speak for the State of Tennessee. Dr. McPhee reports to superiors and he serves in his position as an employee of the State of Tennessee at the pleasure of the TBR. Therefore, Dr. McPhee is not a proxy for the State and the *Faragher/Ellerth* affirmative defense is available to the State.

B. Did the State of Tennessee Exercise Reasonable Preventative Measures

Allen next asserts that the State failed to conclusively prove that the two prongs of the *Faragher/Ellerth* affirmative defense were satisfied as a matter of law. The *Faragher/Ellerth* affirmative defense provides that an employer will not be held liable under the THRA for vicarious liability to a victimized employee for hostile work environment sexual harassment by a supervisor with immediate or successively higher authority over the employee, if the employer proves that (1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and, (2) the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or unreasonably failed to otherwise avoid the harm. *Parker*, 2 S.W.3d at 175.

It is clear that there are two components to the first prong of the *Faragher/Ellerth* affirmative defense. First, the employer must show that it exercised reasonable care to prevent sexual harassment and second, the employer must show that it exercised reasonable care to promptly correct the sexual harassing behavior.

In showing that the University exercised reasonable care to prevent sexual harassment, the State points to the University policy prohibiting employee sexual harassment, which is published online and in the MTSU *Policies and Procedures Manual.* The policy states that any employee who violates the policy will be subject to disciplinary action, including dismissal or other appropriate sanctions. Section 1 of the policy continues that any MTSU employee who believes that he or she has been sexually harassed is required to promptly report the conduct to the University's EO/AA Director. However, Allen claims that in order for an employer to show that it exercised reasonable care to prevent sexual harassment, the employer must not only show that a policy was in place, but that the policy was effective. *See Miller v. Woodharbor Moulding & Millworks, Inc.*, 80 F.Supp.2d 1026, 1029 (N.D. Iowa 2000).

Allen first asserts that the University's policy was ineffective because MTSU failed to provide every employee with a copy of the policy and because it failed to train to all employees regarding the policy. However, in *Reynolds v. Golden Corral Corp.*, 106 F.Supp.2d 1243, 1251 (M.D.Ala.1999), the court found that the employer exercised reasonable care to ensure that its employees were aware of the sexual harassment policy by posting the policy prominently in the plaintiff's work area. The court reasoned that the employer "need not establish that every employee read the posted policy to establish that it exercised reasonable efforts to communicate the procedure." *Reynolds*, 106 F.Supp.2d at 1251.

Furthermore, the record is replete with evidence of the State's diligent efforts to inform its employees and students of the sexual harassment policy. MTSU posted its policies on the campus website, created an online training linked to campus websites, and as of July 2002, included the policy in the orientation package for new students and employees. The University also published informational brochures which were available across campus as well as notices in the campus newspaper. In addition, MTSU brought outside speakers to campus and conducted training sessions for individual departments and offices. Finally, the University required that new employees hired after July 2002 take and pass an online test on the sexual harassment policy. Allen's argument that

a number of polled employees had not received training regarding the sexual harassment policy does not alone establish that the University's policy was ineffective.

Allen next contends that MTSU's policy was ineffective because it failed to provide a clear explanation of prohibited conduct and because it failed to provide a clear and accessible complaint process which created no unreasonable obstacles. Although the Court believes that the University's complaint process may in fact be deficient, in that it provided for a single channel to report sexual harassment and it failed to provide for instances when the President is the alleged harasser, these deficiencies did not prevent Allen from reporting the harassment nor did it impede MTSU from immediately remedying the alleged harassment. The issue here is not a question of the effectiveness of the policy but rather one of causation.

In *Bernard v. Calhoun Meba Eng'g Sch.*, 309 F.Supp.2d 732, 741 (D.Md.2004), the court found that summary judgment was proper despite the deficiencies in the employer's harassment policy because once the plaintiff reported the harassment, although through the incorrect channel, Defendant responded promptly and effectively. The court stated:

> [S]ummary judgement is warranted on this record because Calhoon promptly responded to Bernard's complaints of racial harassment without regard to the *procedures provided for* in its deficient policy. Shafer, although not the proper person to receive complaints of racial harassment under the Calhoon policy, contacted Trumps and Matthews on the same day that Bernard complained about Helms's racist remarks.
>
> In addition, immediately upon learning of Helms's harassing behavior, Shafer summoned Helms, who at Shafer's insistence "apologized" to Bernard. The following day, Trumps met with Bernard and Helms.
> ...
> In addition to the evident promptness of Calhoon's response, as a matter of law, Calhoon's response to the report of harassment was adequate to remedy the harm done.

Bernard, 309 F.Supp.2d at 741.

We agree with the reasoning in the *Bernard* decision and find that any minor deficiencies in MTSU's policy are inconsequential as the deficiencies did not prevent Allen from reporting the harassment nor did they impede the University from acting to remedy the harassment. Therefore, the trial court did not err in finding as a matter of law that the State exercised reasonable care to prevent sexual harassment.

C. Did the State of Tennessee Exercise Reasonable Corrective Measures

Allen next contends that the State failed to conclusively show that it acted promptly to correct the sexually harassing behavior. Once the employer has notice of allegations of sexual harassment,

the employer must "act promptly and in a way which effectively eliminates the harassment complained of." *Graves v. Circuit City Stores, Inc.*, No. 03A01-9501-CH-00012, 1995 WL 371659, at *3 (Tenn.Ct.App.1995). The reasonableness of an employer's response to allegations of sexual harassment will vary depending on the circumstances of each case and, thus, must be evaluated on a case-by-case basis. *Rabidue v. Osceola Ref. Co., a Div. of Texas - Am. Petrochemicals, Inc.*, 805 F.2d 611, 621 (6th Cir.1986); *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 33 (Tenn.1996).

Allen asserts that the State failed to act promptly to correct Dr. McPhee's sexually harassing conduct because (1) the investigation was not thorough and impartial; (2) Dr. McPhee's punishment was inadequate; and, (3) Allen's new position is substantially dissimilar from her previous position.

First, there does not appear to be any evidence in the record of inadequacies or partiality in the investigation. Chancellor Manning received Allen's Complaint on October 6, 2003, and thereafter immediately began the investigation into Allen's allegations on October 8, 2003. Dr. McPhee was informed of the Complaint on October 9, 2003, and instructed not to return to his office. Beginning on October 10, 2003, Allen was placed on administrative leave with pay through October 17, 2003, with the agreement of Allen and her attorney, in order to remove her from any further contact with Dr. McPhee. On October 17, 2003, Allen was instructed to return to work in the Development Office at MTSU with the same job title, job classification, and rate of pay, in order to ensure that Allen was working in an environment free from harassment and any potential retalitation. Although Allen refused the temporary reassignment, Allen was allowed to remain on administrative leave with pay. After the conclusion of the investigation, Johnson issued her report and recommendations on November 23, 2003, which Chancellor Manning accepted and implemented in full on December 5, 2003. Allen fails to cite any instances of sexual harassment occurring after Chancellor Manning received her Complaint on October 6, 2003.

In *McCormick v. Kmart Distrib. Center*, 163 F.Supp.2d 807 (N.D.Ohio 2001), an employee sued her employer and supervisor, alleging that the supervisor sexually harassed her in violation of Ohio law. The court dismissed the employee's sexual harassment claim as a matter of law explaining:

> Kmart immediately launched an investigation, and based upon the substantiation of only one of the many alleged comments, Kmart refused to move Spiva to third shift (Plaintiff's new shift). Ultimately, the fact that Kmart promised that Plaintiff would have no further contact with Spiva, and that, in fact, Plaintiff has had no further contact with Spiva demonstrates that Kmart "exercised reasonable care to prevent and correct promptly any sexually harassing behavior." Consequently, while genuine issues of material fact exist as to whether Spiva's comments were "severe and pervasive", Plaintiff's hostile work environment sexual harassment claim against Kmart must be dismissed as a matter of law.

McCormick, 163 F.Supp.2d at 828.

Furthermore, Allen's claims of inadequate and improper investigation derives no substantial support from the record. Allen contests the fact that Dr. McPhee and Johnson happened to be concurrently employed by the TBR for a period of two (2) years; however, Allen makes no substantiated assertions of partiality which resulted from this relationship. Allen also argues that Johnson failed to personally contact a former secretary at the University of Memphis regarding an allegation of harassment despite the fact that Johnson contacted the EO/AA Director at the campus and determined that the allegations were unfounded. Allen's final contention is that Johnson failed to interview any witnesses after Dr. McPhee submitted his revised written response on October 29, 2003. However, Dr. McPhee submitted his original written response on October 20, 2003, and it is undisputed that 16 witnesses including Dr. McPhee himself were personally interviewed during that time.

It also does not appear that the record supports Allen's assertion that Dr. McPhee's punishment was inadequate. Chancellor Manning implemented the sanctions provided in Johnson's report and recommendations, which included a 20-day suspension without pay, a $10,000 reduction in annual salary for one year, and a requirement to participate in eight (8) hours of employment issue training, which included training on sexual harassment law. The Court finds that the State's response to Allen's allegations of sexual harassment was reasonable.

Finally, Allen asserts that the State's corrective measures were inadequate because Allen's new position is not substantially similar to her previous position. Following the investigation, Chancellor Manning directed that Allen be transferred to a coordinator position in the MTSU Development Office, where she reports directly to the Vice President for Development. Allen contends that the position has no defined job duties, less prestige, and no supervisory capacity. However, Allen's new position included an increase in pay from $43,072.44 to $47,400.00 and her job duties include responsibility for office budget and personnel. Also, it appears that transferring Allen to a similar position at another TBR institution in Murfreesboro was not an available option. There is only one President's Office at MTSU, which continues to be occupied by Allen's alleged harasser, and there are no other TBR universities or community colleges in Murfreesboro. Furthermore, Allen's highest completed level of education is high school, and thus her lack of a college degree limited the jobs for which she was qualified. Based on the circumstances of the case, the State acted promptly and in a way which effectively eliminated the harassment.

D. Did Allen Unreasonably Fail to Take Advantage of the State of Tennessee's Preventative and Corrective Measures

Allen's final argument regarding the State's liability for supervisor-created harassment concerns whether the State proved as a matter of law that Allen unreasonably failed to take advantage of the State's preventative and corrective measures. MTSU's sexual harassment policy requires that any MTSU employee who believes that he or she has been sexually harassed promptly report the conduct to the University's EO/AA Director. The State asserts that the purpose behind the policy is to deter further occurrences of unwanted sexually harassing conduct and to prevent objectionable conduct from becoming sufficiently severe or pervasive so as to create a hostile working environment.

The State argues that Allen unreasonably failed to take advantage of the University's policy because Allen waited more than a year before reporting the alleged misconduct, which Allen admitted was seven (7) months after she read the MTSU policy online at her home. The State also asserts that Allen acted unreasonably by failing to file her Complaint using the internal institutional procedures that were in place at the University, by instead, reporting the misconduct to the TBR. However, Allen argues that she was reluctant to report the harassment because her harasser was the President of the University and as such, he undoubtedly occupied a position of power at the University. Furthermore, Allen contends that the policy provided that as President, Dr. McPhee would receive notice of her Complaint and authority in the outcome of her Complaint.

The Sixth Circuit has held that "while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense." *Faragher*, 524 U.S. at 807-808. In *Idusuyi v. State of Tenn. Dept. of Children's Servs.*, 30 Fed.Appx. 398, 403 (6th Cir.2002), a state female employee brought a hostile work environment sexual harassment claim against her employer, although she failed to mention the harassment until after she had left employment at DCS. Plaintiff admitted that she knew that DCS had a sexual harassment policy but she attempted to justify her silence by claiming that she thought that complaints would be futile because of her harasser's relationship with DCS leaders. *Idusuyi*, 30 Fed.Appx. at 403. The court held that "it is unreasonable for employees to pass their own judgments--absent any supporting facts--about how effectively an employer's sexual harassment policies operate. The plaintiff knew of the existence of a sexual harassment policy, and her failure to pursue a remedy under that policy was unreasonable." *Idusuyi*, 30 Fed.Appx. at 404.

Much like the plaintiff in *Idusuyi*, it was unreasonable for Allen to unilaterally determine that MTSU's policy was ineffective. Allen was admittedly aware of the policy in February 2002, but chose not to file her Complaint until October 6, 2003. Furthermore, although informed of the internal institutional procedures in place the University, which required her to promptly report any allegations of sexual harassment to the University's EO/AA Director, Allen opted to file her Complaint with the TBR. Allen's failure to comply with the complaint procedure provided by the State as well as her failure to report Dr. McPhee's misconduct until over a year from the first occurrence exhibits an unreasonable failure to utilize the State's preventative and corrective measures.

IV. Retaliation Claim Against the State

The final issue Allen raises on appeal concerns whether the State established as a matter of law that it could not be liable for retaliation against Allen. In order to establish a *prima facie* case of retaliation, the plaintiff must show that (1) she engaged in a protected activity; (2) the defendant knew of this exercise of her protected rights; (3) the defendant took an employment action adverse to the plaintiff; and, (4) there was a causal connection between the protected activity and the adverse employment action. *Newsom*, 924 S.W.2d at 96.

It is clear from the record that Allen engaged in a protected activity by filing a hostile work environment sexual harassment complaint against her supervisor and that the State was aware of the exercise of this right. However, it is less clear whether the State took an employment action adverse against Allen as a result of her decision to file a harassment complaint.

"An 'adverse employment action' is a materially adverse change in terms and conditions of employment, such as termination of employment, demotion with a decrease in salary, reclassification to a less distinguished title, material loss of benefits, or significantly diminished material responsibilities." *Spann*, 36 S.W.3d at 468. The Tennessee Supreme Court has held that an adverse employment action must be more than a mere inconvenience or alteration of an employee's job responsibilities. *Barnes v. Goodyear Tire and Rubber Co.*, 48 S.W.3d 698, 707 (Tenn.2000). Also, not every "unpleasant matter occurring at work and not every action by an employer that an employee disagrees with or dislikes constitutes an adverse employment action." *Spann*, 36 S.W.3d at 468 (Tenn.Ct.App.1999).

Allen argues that her transfer to the position of Coordinator in the University's Development Office was an adverse employment action because the position has less responsibility and prestige. However, the State contends that Allen's lack of a college degree and the University policy which requires that "[a]ppropriate steps must be taken to ensure that the harassment will not occur" severely limited the positions which were available and for which Allen was qualified. The State asserts that although the transfer had a different job title and different responsibilities, the position increased Allen's annual pay, is ungraded and therefore has no established maximum salary level, and merely altered her job responsibilities.

In *Moore v. City of Chicago*, 126 Fed.Appx. 745 (7th Cir.2005), a former police officer sued the city, alleging racial discrimination and retaliation in violation of federal law. The Seventh Circuit held that Plaintiff's intra-department transfer from the detective division to the patrol division did not constitute an adverse employment action. *Moore*, 126 Fed.Appx. at 745. The court reasoned,

> A purely lateral transfer that involves no reduction in pay and no more than a minor change in working conditions is not a materially adverse employment action. *Id.* at 911-12.
> Moore failed to offer sufficient evidence that he suffered a materially adverse employment action. His transfer from the detective division to the patrol division did not alter his title, salary, seniority, or benefits. He cannot establish an adverse employment action through unsupported statements and subjective beliefs that his transfer resulted in decreased responsibility and lost opportunities to enhance his skills and advance his career. *See id.* at 913.

Moore, 126 Fed.Appx. at 747 -748.

Like the plaintiff in *Moore*, Allen failed to produce objective evidence to show that her transfer was to a position that was materially less prestigious, materially less suited to her skills and

expertise, or materially less conducive to career advancement. Allen's allegations of retaliation are limited to her subjective belief that her new position as Coordinator in the University's Development Office is less prestigious and requires less responsibility than her position as Administrative Assistant to the President. Subjective beliefs alone are insufficient to establish a *prima facie* case of retaliation.

"Adverse employment action" within the meaning of THRA is discussed at length in *Regnier v. Metropolitan Gov't of Nashville and Davidson County,* No. M2004-00351-COA-R3-CV (Tenn.Ct.App. May 11, 2006) (Westlaw, Tenn. Case Law), which is being released contemporaneously with this opinion and to which reference is made for further reasoning.

V. Conclusion

It is well to delineate what this case is and what it is not. It is a claim for supervisor sexual harassment based upon Tennessee Code Annotated section 4-21-101, *et seq*. It is not a suit against the State or Dr. McPhee for invasion of common law rights nor a criminal prosecution of Dr. McPhee.

The boorish behavior of Dr. McPhee is by no means sanctioned by this Court. The adequacy or inadequacy of the punitive sanctions visited by TBR upon Dr. McPhee is not a subject for appellate review in this case. Once the standards mandated by *Burlington Indust., Inc. v. Ellerth*, 524 U.S.742 (U.S.1998), *Faragher v. City of Boca Raton*, 524 U.S. 775 (U.S.1998) and *Parker v. Warren County Util. Dist.*, 2 S.W.3d 170 (Tenn.1999) are applied, the case boils down to whether or not the affirmative defenses offered by Defendants are established as a matter of law. As in *Parker*, the record in this case is insufficient to establish that Plaintiff has suffered a tangible employment action. She is earning more money and in a position normally requiring higher educational qualifications than she possesses.

It cannot be said that the State did not exercise reasonable care to prevent and correct the harassing behavior. It immediately prevented further contact between Plaintiff and her harasser. To keep her in a position immediately subordinate to the President could hardly be called reasonable. To accommodate her apparent subjective desires would require the firing of Dr. McPhee and the hiring of a new president for the University with instructions to the new president to retain Plaintiff in her position as personal secretary/administrative assistant to the president. The State has recognized the transgressions of Dr. McPhee and punished him accordingly. Plaintiff is not empowered to dictate to the State the particulars of business decisions. *Bruce v. W. Auto Supply Co.*, 669 S.W.2d 95, 97 (Tenn.Ct.App.1984).

It is difficult to conceive what more the State could have done to prevent and correct the harassing behavior. This is not a case where no policy against sexual harassment was in place prior to the offending behavior as was the case in *Parker*. Plaintiff's failure to take advantage of preventive and corrective opportunities provided by the employer and the affirmative defenses under *Parker* are established as a matter of law.

Finally, there is no requirement in the law that Plaintiff be retained in her position as secretary to the president. It is her right not to be subjected to "adverse employment action" as retaliation. Other than her subjective displeasure, no adverse employment action is established in this record.

Whatever civil remedies may be available to Plaintiff or may have been available to Plaintiff are not before the Court in this action, limited as it is to Tennessee Code Annotated section 4-21-101, *et seq*. Summary judgment was properly granted and the judgment of the trial court is affirmed. Costs of the cause are assessed to Appellant.

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WILLIAM B. CAIN, JUDGE